Remarks

Priority

The certified copy of the priority application, as required by 35 U.S.C. 119(b), is enclosed herewith.

Status of Claims

Claims 6, 13 to 16, and 23 have been objected to due to wording informalities. Claims 1 to 5, 7 and 15 to 22 have been provisionally rejected under 35 USC 101 for statutory type double patenting.

Claims 6, 9, 18, 20 and 26, claims 12 to 13, claim 14, claim 23, and claims 24 to 25 have been provisionally rejected under the judicially created doctrine of obviousness-type double patenting.

The Examiner has objected to claims 8, 10 to 11 as being dependent on a rejected base claim, but indicated that such claims would be allowable if rewritten in independent form.

The rejections are respectfully traversed. Reconsideration is requested for the reasons set out below.

Applicants' Response to the Claim Wording Objections

The claims have been amended to correct the wording objections. Also, in both claims 1 and 15, the term "in dependence of" has been clarified as "dependent upon".

Statutory type double patenting rejections

Claim 1 and dependent claims 2 to 5 and 7

The present application includes one independent method claim 1 and one independent apparatus claim 15. The cited published US application No.

2002/0181436 ("Mueckenheim") includes one independent method claim 1 and one independent apparatus claim 13.

Comparing claim 1 of the present application and claim 1 of the cited Mueckenheim application, it will be noted that claim 1 of Mueckenheim requires the following features not required by claim 1 of the present application:

assigning to each transport block (TB) a respective associated transport format (TF), and

creating block sets (TBS) with the determined transport blocks (TB) to be transmitted by the physical layer (PHY-layer) by using the respective associated transport format (TF) as assigned.

Accordingly, claim 1 of the present application is not co-extensive in scope with claim 1 of the cited application, and indeed is narrower than claim 1 of the present invention at least in respect to the features quoted above. Moreover, none of the claims which depend from claim 1 of the present application require the above-quoted features.

In determining whether there is a statutory basis for a double patenting rejection, the proper inquiry is whether the same invention is being claimed twice. The CCPA articulated in In re Vogel, 422 F. 2d 438, 164 USPQ 619 (CCPA 1970) a still accepted test for statutory double patenting. That test is whether a claim in the application could be literally infringed without literally infringing a corresponding claim in the "patent". (In the present instance, the "patent" is the Mueckenheim application.) If there is an embodiment of the invention that falls within the scope of one claim but not the other, then identical subject matter is not defined by both claims, and the statutory basis for a double patenting rejection falls away.

Turning to claim 1 of the instant application, Applicants submit that their claim can be literally infringed without performing the "assigning" and "creating" steps

quoted above. In other words, the instant claim 1 can indeed be literally infringed without literally infringing the Mueckenheim claim 1.

It follows that the provisional rejection for statutory type double patenting against present claims 1 to 5 and 7 falls away. Applicants respectfully request on that ground that the statutorily-based rejection for double patenting be withdrawn.

Claims 15 and dependent claims 16 to 22

Comparing claim 15 of the present application and claim 13 of the cited application, it will be noted that claim 13 of the cited application requires the following features not required by claim 15 of the present application:

for assigning to the scheduled protocol data units (PDU) respective associated transport formats, and

for signalling the transport formats to means for creating transport block sets by using the dynamically scheduling results and the respective associated transport formats as assigned.

For substantially the same reasons as argued above in respect to claim 1, Applicants submit that claim 15 of the present application is not co-extensive in scope with claim 13 of the cited application, and therefore that the provisional rejection for statutory type double patenting against claims 15 to 22 must fall away. Accordingly, withdrawal of the rejection is respectfully requested.

Non-Statutory Double Patenting Rejections

A terminal disclaimer in compliance with 37 CFR1.130(b) is enclosed. Accordingly, these non-statutory double patenting rejections fall away. Withdrawal of the rejections in view of the terminal disclaimer is respectfully requested.

Conclusion

In view of the foregoing, allowance of all the claims presently in the application is respectfully requested, as is passage to issuance of the application. If the Examiner should feel that the application is not yet in a condition for allowance and that a telephone interview would be useful, he is invited to contact Applicant's undersigned attorney at the telephone number listed below.

Respectfully submitted,

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Certified Copy of EP 00310343.9
Terminal Disclaimer

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